IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

TUESDAY, THE 2ND JANUARY 2007 / 12TH PAUSHA 1928

RP.No. 952 of 2006()

AGAINST THE JUDGEMENT IN WPC.17171/2006 Dated 31/08/2006

PETITIONER:

ALEYAMMA, W/O.VARGHESE,
AGED 72 YEARS, RESIDING AT KUNNATHU
KALAPURACKAL HOUSE, NECHOOR KARA,
MANEED VILLAGE, MUVATTUPUZHA.

BY ADV. SRI.A.T.ANILKUMAR

RESPONDENTS:

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1. RAJU, S/O. CHOTHI, AGED 35 YEARS,
PATHARIPPATTU HOUSE, MANEED KARA,
MANEED VILLAGE, MUVATTUPUZHA TALUK,
ERNAKULAM DISTRICT.

2. GOPI, S/O.AYYAPPAN,
AGED 35 YEARS, MARATTITHADATHEL
(CHUNDAMALAYIL) HOUSE, MANEED KARA,
MANEED VILLAGE.

3. GOPI, S/O.KURUMBAN, AGED 36 YEARS,
VADAKKEMALAYIL HOUSE, NECHOOR KARA,
MANEED VILLAGE, MUVATTUPUZHA TALUK,
ERNAKULAM DISTRICT.

4. KUNJAPPAN, S/O.PALAN,
AGED 36 YEARS, MATTATHIL HOUSE,
NECHOOR KARA, MANEED VILLAGE,
MUVATTUPUZHA TALUK, ERNAKULAM DISTRICT.

BY ADV. SRI.BIJU ABRAHAM
SRI.M.POLY MATHAI
SRI.P.CHELLAPPAN

THIS REVIEW PETITION HAVING BEEN FINALLY HEARD ON 02/01/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K. PADMANABHAN NAIR, J.

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R.P. NO. 952 OF 2006

IN

W.P(C) NO. 17171 OF 2006

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Dated this the 2nd day of January, 2007

O R D E R

Review Petitioner is the petitioner in the aforesaid Writ Petition.

2. Petitioner filed O.S. No.39 of 2004 before the Sub Court, Muvattupuzha against respondents for a decree of permanent prohibitory injunction. In that suit she filed I.A. No.402 of 2004 for an order of temporary injunction under Order XXXIX, Rules 1 and 2 of Civil Procedure Code restraining respondents from entering into plaint A & B schedule properties, causing any damage to boundaries and from destroying the gate built by her. Respondents filed I.A. No.489 of 2004 against petitioner-plaintiff for an interim mandatory injunction directing her to remove two new gates put up by her obstructing their right of way. Trail court dismissed application filed by petitioner and allowed application filed by respondents. Challenging those orders,

petitioner filed C.M.A. Nos.113 and 114 of 2004 before District Court, Ernakulam. Lower appellate court concurred with findings of trial court and dismissed both C.M.As. Petitioner filed W.P(C) No.17171 of 2006 challenging judgment in C.M.A. No.113 of 2004 by which court below confirmed order of interim mandatory injunction. Writ Petition No.17163 of 2006 was filed against judgment in C.M.A. No.114 of 2004 dismissing application filed by petitioner for deputing a Commissioner to restore a gate stated to have been removed by respondents at the beginning of pathway.

3. By judgment dated 31.8.2006 I dismissed W.P(C) No.17171 of 2006. This review petition is filed by petitioner to review that judgment.

4. The order of temporary injunction passed by trial court against petitioner from causing any obstructions to respondents from using pathway has become final and conclusive. A gate put up by petitioner at the beginning of plaint B schedule property was removed. Her request to depute an Advocate Commissioner to rebuild the gate was dismissed by

trial court. That order has also become final and conclusive.

5. Petitioner had constructed another gate which was marked by Commissioner in the sketch produced along with Annexure B commission report and plan. The plan shows that petitioner had put up two gates in the B schedule property. One at the beginning of the pathway and another very near to 4th respondent's house. The materials on record prima facie show that that will not cause any obstruction to the members of the K.P.M.S. and also 4th respondent in using B schedule pathway for their ingress and egress to their respective properties. The grievance of the petitioner is that though that gate is not creating any nuisance or difficulties to 4th respondent and will not affect right of easement of contesting respondents, that gate was also directed to be removed and this Court has not considered that aspect while disposing of the Writ Petition.

6. It is true that this Court had only considered whether petitioner is entitled to get the gate at the beginning of B schedule pathway restored. It was held that finding of the court below on that point was correct and does not call for any

interference. Whether the second gate which is shown by the Commissioner on the southern side of the house of 4th respondent will cause any nuisance or difficulty to 4th respondent for ingress and egress to his property was not considered. A perusal of Annexure B report and plan prima facie shows the existence of that gate for the respondents to use plaint B schedule pathway for their ingress and egress to their properties. So, I am of the view that removal of the gate can be deferred till the final decision in the suit. I make it clear that this order will not give any right to the petitioner to remove and place that gate to another place so as to obstruct right of way of 4th respondent. In case the petitioner removes and place the gate eastwards, it is open to the respondents to move for removal of the same. It is made clear that trial court shall decide this issue untrammelled by any of the observations contained in the impugned order and judgment. It is also made clear that this order will not affect the right of any person who is not a party to the proceedings.

7. In the result, Review Petition is disposed of in the

following manner.

Direction of the court below to remove the second gate referred to in paragraphs 1 and 2 of Annexure B Commission report will be kept in abeyance till the matter is finally decided by the trial court. I make it clear that I have not considered the rights of the parties and this order will not be a bar to the court below to order removal of the gate in case it is found that the respondents have right to get it removed. I also make it clear that this order is passed only as a temporary interim arrangement subject to the final result of the suit.

K. PADMANABHAN NAIR, JUDGE.

vsv

K. PADMANABHAN NAIR, J.

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R.P. NO.

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O R D E R

4TH JANUARY, 2007